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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 -----x

4 LOGAN CHENG,

5 Plaintiff,

6 v.

7 20 Civ. 5678 (KPF)

8 WENGUI GUO,

9 Defendant.
10

11 -----x
12 New York, N.Y.
13 April 29, 2021
14 10:00 a.m.

15 Before:

16 HON. KATHERINE POLK FAILLA,

17 District Judge

18 APPEARANCES

19 RANDAZZA LEGAL GROUP PLLC
20 Attorneys for Plaintiff
21 BY: JAY M. WOLMAN
22 MARK RANDAZZA

23 SCHULMAN BHATTACHARYA LLC
24 Attorneys for Defendant
25 BY: JEFFREY S. GAVENMAN

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(The Court and all parties appearing telephonically)

THE DEPUTY CLERK: Counsel, please state your name for the record, beginning with plaintiff.

MR. WOLMAN: Good morning, your Honor.

This is Jay Wolman at Randazza Legal Group for plaintiff Logan Cheng.

THE COURT: Good morning, sir. Thank you.

MR. RANDAZZA: Good morning, your Honor.

9 This is Jeffrey Gavenman, and I have Sabrina Schiller
10 on the line from my office. We're from the firm Schulman
11 Bhattacharya and represent Defendant Guo.

THE COURT: Thank you to you as well.

13 All right. I appreciate your willingness to
14 participate in this conference telephonically. In my prior
15 endorsement of the 22nd of April, I resolved what, for me, was
16 the issue regarding the implication of the Fifth Amendment
17 privilege against self-incrimination, and I did want to discuss
18 today, because of that resolution, the issue of the
19 attorney-client privilege.

20 Just to note some things in Mr. Wolman's letter of
21 yesterday afternoon. Mr. Gavenman, have you received that
22 letter?

MR. GAVENMAN: Yes, I did, your Honor.

THE COURT: OK. Thank you.

Because I'm hoping you'll be responding to it this

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1 morning. Let me just note something because of my resolution
2 of the Fifth Amendment issue. The first footnote, I think, is
3 a question of judicial documents and the presumption of public
4 access to such documents.

5 Mr. Wolman, I wasn't sure what you were trying to get
6 out here in this footnote. If what you want me to do is make a
7 more robust finding regarding why I am not disclosing this
8 information, I will do so.

9 But let me ask you, what is the purpose of your
10 footnote one?

11 MR. WOLMAN: Thank you, your Honor.

12 There are certainly two purposes. One is to find out
13 what was filed with the court ex parte and in camera under
14 seal. Two, then to get a better understanding to make a record
15 for potential further review of your Honor's order because,
16 again, some of the basic questions that were asked at the
17 deposition where the Fifth Amendment was invoked was what even
18 is the investigation or charges pending. This is, of course,
19 information already in the hands of the government, if they are
20 investigating or charging. It would not be, in our opinion,
21 privileged in any way. There would be no confidentiality to
22 Mr. Guo to that effect.

23 So both to know what was submitted, to the extent that
24 material itself does not self-incriminate, but is otherwise
25 available for public inspection under Brown v. Maxwell, and to

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1 then be able to, as I said, set up a record for appellate
2 purposes.

3 THE COURT: I see.

4 Mr. Gavenman, do you wish to speak to the issue of
5 what you submitted to me, or do you wish me to speak to the
6 issue, sir?

7 MR. GAVENMAN: Well, I'd be happy to have you speak,
8 Judge. Whatever you would like to. Certainly, as your Honor
9 knows -- I don't want to get into the details of it, but as
10 your Honor knows -- there was sensitive information submitted,
11 and I think there was a robust showing of why it was invoked
12 and the need to keep it sealed.

13 So I certainly understood the court to continue to do
14 that. If the issue -- it is going to be difficult to brief the
15 issue without revealing additional information. I think there
16 has certainly been a showing for why the information need to be
17 sealed, and the harm there would be if it was not kept sealed.

18 THE COURT: Mr. Wolman, let me explain to you what I
19 am comfortable explaining to you.

20 I did receive an in-camera submission that included a
21 letter from counsel and a sworn statement from counsel. I'm
22 not going to note specifically which counsel, whether there was
23 more than one, but there was a very detailed recitation,
24 historical recitation, of investigations and matters that made
25 clear to me, number one, that this is an appropriate invocation

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1 of the Fifth Amendment, and secondly, that disclosing the
2 details of any investigation or investigations would very
3 likely compromise them, which is why I am not doing it.

4 So that is what I can tell you. I got a letter. I
5 got a sworn statement from counsel. I can tell you, as well,
6 that they were very, very detailed, and that upon reading them,
7 I did feel comfortable with Mr. Guo's invocation of the Fifth
8 Amendment privilege.

9 That's what I'm comfortable say, sir, because I'm not
10 interested in compromising investigations by other authorities.

11 MR. WOLMAN: May I inquire, your Honor?

12 How does it compromise an investigation where Mr. Guo
13 already knows about the existence thereof?

14 THE COURT: Sir, I'm not going to answer that
15 question. You have the record that you have, and if you wish
16 to take it up, you know how to do so.

17 But you've suggested that these are judicial
18 documents. The deposition, when included as an exhibit to a
19 letter, may be a judicial document. But an in-camera
20 submission that I sought to substantiate a Fifth Amendment
21 self-incrimination privilege is not something that, to me, to
22 give further detail would actually undermine the privilege,
23 which is not something that I'm interested in.

24 I'll also note that, in the Brown decision that you
25 have cited to me, they have themselves left open the

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1 possibility of this happening. For example, footnote three of
2 that decision indicates that the presumption of public access
3 does not apply to material that -- excuse me, footnote 33,
4 presumption of public access does not apply to material that is
5 submitted to the court solely so that the court may decide
6 whether that same material must be disclosed in the discovery
7 process or shielded by a protective order.

8 So, again, sir, I appreciate that you want more
9 information. You're not getting it out of me.

10 MR. WOLMAN: I understand, your Honor.

11 I should note, for the record, you know, our firm and
12 myself actually represented one of the litigant interveners who
13 appear and argued in Brown v. Maxwell and has been involved
14 with Judge Preska's unsealing process in the Giuffre v. Maxwell
15 matter, and I would beg to differ as to the submissions not
16 being judicial documents.

17 They do inform your Honor's decision as to whether or
18 not the Fifth Amendment applies, not whether or not the
19 disclosure itself, the answers to the interrogatories, the
20 deposition questions or to request for production. Those
21 documents are what the court is considering under footnote 33.

22 THE COURT: And that is where you and will differ
23 then.

24 Let's, please, sir, move on to the attorney-client
25 privilege issue. I do have your submission of yesterday, and

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I guess I would like to understand, as I read it, what you're saying is that Mr. Guo has simply not established that the attorney-client privilege shields the conversations as to which he has invoked the privilege. But even if he had established it, which you believe he has not, such privilege is waived by his conduct at the deposition or other conduct.

Do I understand your argument correctly, sir?

MR. WOLMAN: There are two aspects, your Honor.

THE COURT: Yes, sir.

MR. WOLMAN: One is conversations with counsel, specifically Mr. Podhaskie or any other attorney. The question is, has he established that this person is actually his attorney? I would submit he has not.

It is his burden to establish this as the person invoking the privilege. He has given no investigation. In fact, he often does not know who his counsel is. He does not have in writing or not sure what, if anything, is the scope of Mr. Podhaskie's representation, when it is curious how especially an in-house counsel would be providing him individually advice.

I know he has an association with Golden Spring, but from my own practice, typically if I'm representing a company, when I'm talking to an employee, I have to give them an Upjohn warning because they are not my client. So there has not been an establishment of attorney-client relationship, which is the

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1 foundation for attorney-client privilege. He hasn't
2 established that any of these conversations where Mr. Gavenman
3 advised him not to disclose were solely in the presence of his
4 attorney, as opposed to third-party personnel from Spring.

5 And with respect to written documents, anything he has
6 received by mail, even if there is an established attorney-
7 client relationship, such as with Mr. Gavenman, if Mr. Gavenman
8 has been sending him documents by mail, for example, and
9 Mr. Guo purposely has third parties check and open his mail --
10 which he testified to that he doesn't know who is looking at
11 his mail, he leaves it for Golden Spring to pick up -- we cited
12 to his testimony in our letter, to the extent there even was
13 attorney-client privilege, now that he's giving all of his mail
14 to a third party, he has waived that privilege.

15 THE COURT: Is there a possibility that this is a case
16 involving either a joint representation or a common legal
17 interest?

18 MR. WOLMAN: It would be the burden of proof on the
19 plaintiff to show that of the person -- I'm sorry, the
20 defendant, the person invoking the privilege, to show that.
21 And right now, there is no evidence of that.

22 THE COURT: This is your argument regarding the
23 establishment of the privilege.

24 With respect to the issues of waiver, what I
25 understand you to be saying is that the fact that there is a

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1 possibility the conversations may have taken place in the
2 presence of third parties, that would viciate the privilege.
3 And separately, that the fact that Mr. Guo has someone or
4 concedes that there is someone other than he opening his mail,
5 include potentially legal mail, might operate as a waiver of
6 the privilege.

7 Are you also arguing that his deposition testimony
8 itself amounted to waiver, or is it the involvement of third
9 parties?

10 MR. WOLMAN: I would say it is the involvement of the
11 third parties that he testified to, where he just has Golden
12 Spring check his mail. All of his mail, and I should say also
13 the documents that he is producing in this case, he produced to
14 Golden Spring for them to somehow process, and then it gets
15 produced to Mr. Gavenman, who produces it to us. Whatever
16 documents are going there, because he testified that he doesn't
17 have any records personally. I asked him. He's got no
18 devices. He's got no files. Nothing.

19 Whatever he gave them somehow, whatever he may have
20 kept, to the extent that is even consistent, he processes
21 through Golden Spring. His mail goes there. Golden Spring is
22 not a law firm. There is, you know, no evidence that they've
23 been retained by any law firm in connection with the litigation
24 here. So we see no reason why, you know, it's not just merely
25 a disclosure to a third party, as if you gave it to your

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1 brother.

2 THE COURT: OK. Let me ask you something else, sir,
3 just so that the record is clear.

4 Your letter to me of yesterday contains four different
5 spellings for the in-house counsel with Golden Spring. May I
6 please have the correct spelling of his name so that I may be
7 referring to him correctly in this matter?

8 MR. WOLMAN: I apologize for that, your Honor.

9 Let me see. Daniel certainly is the normal spelling.
10 I believe it is P-o-d-h-a-s-k-i-e.

11 THE COURT: Thank you.

12 OK. All right. Mr. Gavenman, why don't you begin by
13 telling me how your client established, either during the
14 deposition or in documents preliminary to the deposition, that
15 he had an attorney-client relationship with Mr. Podhaskie.

16 MR. GAVENMAN: Yes, your Honor.

17 During the deposition, it was quite clear he wasn't
18 his lawyer and hasn't been his lawyer all along. There is, in
19 the deposition, that was discussed and really it was not
20 challenged during the deposition. There was not a request to
21 make a proffer about exactly what that was and, frankly, there
22 were some Fifth Amendment invocation issues anyway, since there
23 would have been that request, but it wasn't likely done a
24 motion on it.

25 There's been a reason to set forth that basis.

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1 Really, the footnote in Mr. Wolman's letter was the first time
2 this was recognized, and not even directly. It was in a motion
3 to extend discovery. It really is not a correctly teed up
4 issue where we have had a chance to go forward.

5 But there is a couple of things I want to note in
6 here. One is he did say that Daniel was his lawyer and had
7 been his lawyer for a long time. Another thing is this common
8 interest privilege question you raised.

9 You know, it is interesting that Mr. Wolman is
10 suggesting there is no basis for that, yet is trying to also
11 suggest there is a basis to bring in Golden Spring as an alter
12 ego. Certainly those two positions are inconsistent. If he
13 thinks there was a basis to bring them in as an alter ego, yet
14 there is no common interest, there was discussions and
15 testimony about the fact that Golden Spring is paying for the
16 litigation and some other nuggets like that.

17 I think there is some discussion --

18 THE COURT: Mr. Gavenman, I'm going to ask you to
19 pause, please, sir.

20 MR. GAVENMAN: Sure.

21 THE COURT: Just with respect to the tension that you
22 just now identified. I think the issue is that Mr. Wolman is
23 not saying that it could never be the case that Mr. Podhaskie
24 could be representing him or even could have either a joint
25 representation or a common legal interest. I think what he is

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1 saying is that Mr. Guo's answers in his deposition, and the
2 other evidence that has been presented to plaintiff in this
3 case, does not substantiate either a joint relationship or a
4 common legal interest.

5 Sir, let me ask you a different question, please, and
6 that is: Tell me about Mr. Podhaskie. I don't believe him to
7 be on this call, or I would ask him these questions myself.
8 But is he an in-house lawyer at Golden Spring? Is he a lawyer
9 who provides the equivalent of in-house counsel service to
10 multiple individuals and corporations? What does he do?

11 MR. GAVENMAN: So Mr. Podhaskie was at Golden Spring,
12 and for some time, I understand that he is not at Golden Spring
13 any longer and has not been at Golden Spring for some time.

14 My understanding is there is clients to Golden Spring
15 that he provides services to. I can't tell you I know the full
16 scope of it, but I certainly have always had the understanding
17 that he provided legal services to Mr. Guo. It's always been
18 the understanding that I have had and my experience as well.

19 THE COURT: Did you happen to notice the Vanguard
20 article regarding Mr. Podhaskie?

21 MR. GAVENMAN: I did.

22 THE COURT: Is that the same gentleman? Are we
23 speaking of the same person?

24 MR. GAVENMAN: It is. In fact, in that article, it
25 speaks of his client, and not just singular client in-house,

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1 but clients he serves while he is in that role.

2 THE COURT: Yes. I guess I'm trying to understand
3 that particular role that he has.

4 Please, sir, I realize that you are not he and that
5 you know what you know about his job and you don't know what
6 you don't know about his job. But is he sort of an in-house
7 counsel to multiple corporations and individuals, or are they
8 somehow related to each other?

9 Does he sort of serve as an in-house counsel for
10 limited purposes?

11 I'm just trying to figure out what he does that allows
12 him to claim attorney-client relationships with multiple
13 entities and individuals.

14 MR. GAVENMAN: Understood, your Honor.

15 Couple things. One is, I can't tell you that I know
16 the full scope, and I need to be cautious about saying things I
17 don't know. The other thing is there is some Fifth Amendment
18 issue that exactly how this goes together. I think me making
19 representations about what he does and what he does for Mr. Guo
20 runs into those issues.

21 Certainly, if it is ex parte, perhaps we could get
22 into that a little more. But this certainly has, you know,
23 represented, I think there was testimony in the Pacific
24 Alliance case -- I'm sorry -- in the Eastern Profit case that
25 just occurred in the Southern District about him being his

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1 attorney as well and being a long-time attorney.

2 I think that has -- I don't really know how that all
3 shapes up, and I think to the extent there is some particulars
4 about that, I probably should not make representations about
5 it, both to lack of knowledge and also because of the Fifth
6 Amendment issues. But certainly there was testimony about him
7 being his lawyer.

8 THE COURT: Well, see, as respectful as I have been of
9 your client's Fifth Amendment assertion, insofar as it went to
10 relationships between and among him and certain corporate
11 entities, I'm not sure that I would permit an in-camera
12 submission in order to substantiate an attorney-client
13 privilege.

14 Now, it may be ultimately that you want to think about
15 how you're going to substantiate it and then prepare something
16 accordingly and submit it to me. Because I recognize that you
17 may have been blindsided somewhat by the lateness of the
18 submission from Mr. Wolman.

19 But you're telling me that there was the trial in the
20 Eastern Profit case, I believe that was before Judge Liman in
21 the last couple of weeks, and that there is testimony from
22 someone regarding Mr. Podhaskie's attorney-client
23 relationships.

24 So how am I to understand or, if you will, how is your
25 client to prove that he has an attorney-client relationship

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1 with Mr. Podhaskie that is either of a joint client or a common
2 legal interest type and that it has not been waived?

3 MR. GAVENMAN: Well, I'll speak to the second part of
4 the question first and then back to the first.

5 I think it is actually really important to have the
6 context of where we are here. So there was actually almost no
7 testimony that this privilege is relevant, that Mr. Podhaskie's
8 discussions with Mr. Guo are relevant to what we're doing in
9 this proceeding.

10 In fact, most of the time that there was a discussion
11 about attorney-client privilege, it was involving other
12 litigations that he had. Counsel that made appearances for and
13 was not Mr. Podhaskie has not been in the line of inquiry.

14 The only time there was a discussion, the only time it
15 was discussed and the privilege was invoked was in whether or
16 not he had a discussion with Dan about this case in Nevada.
17 And then a second time, it was asked again, and Mr. Guo said he
18 just didn't recall, simply didn't recall the discussion or the
19 contents of the discussion.

20 As for the mail issue, the suggestion that
21 Mr. Podhaskie or someone at Golden Spring opens all his mail
22 simply was not what was testified to. Mr. Guo said that was
23 not necessarily the case, that Golden Spring opened all his
24 mail, at 55, line 14 through 17.

25 But much more importantly, Mr. Wolman kept slipping in

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1 this idea that there was legal communications coming to Mr. Guo
2 through the mail. If you look at the transcript, those legal
3 communications are from the Randazza Legal Group, opposing
4 counsel. There is no suggestion, no testimony, no record that
5 he was receiving what should have been privileged communication
6 from me or anyone else through the mail that were then being
7 intercepted by Mr. Podhaskie. There is no record for that, and
8 as far as I know, that has never happened. That is not even at
9 issue. All we have is this one conversation, and Mr. Guo later
10 then testified he didn't even recall that issue between him and
11 Mr. Podhaskie. So this is a very small issue that is not
12 really at issue in the case.

13 Now, I was surprised by the submission last night.
14 And also, it is my opinion in a footnote somewhere, this issue
15 really had not been teed up, to the extent your Honor, even
16 though despite the stake I just mentioned, wants to have a
17 submission, I will have to think about how to do that given the
18 Fifth Amendment issues. But there certainly is testimony that
19 he his attorney, there is testimony about certain aspects of
20 the common interest that Golden Spring may have, so I do think
21 there is a basis. And I think this is sort of a sideshow along
22 the lines of what Mr. Cheng's attorneys have been trying to do
23 to try to rip apart and open up Mr. Guo's life and get into
24 every aspect of it, which we have seen really throughout the
25 case. It is not really germane to the issues that they need to

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1 prove.

2 THE COURT: Mr. Gavenman, you do communicate with
3 Mr. Guo, do you not?

4 MR. GAVENMAN: I do.

5 THE COURT: Do you do so by mail?

6 MR. GAVENMAN: I have never once communicated with him
7 by mail.

8 THE COURT: All right. I don't know if you would know
9 how Mr. Podhaskie communicated with him, so I am not going to
10 ask you to make those representations.

11 Mr. Wolman, I am returning --

12 Well, Mr. Gavenman, it is highly likely that at the
13 end of this conversation I will ask you for a submission, in
14 whatever format you think appropriate, regarding the
15 attorney-client privilege. And when I say that, when I say the
16 term with whatever format you think appropriate, I'm really
17 speaking to its length, its contents, and its structure. I
18 don't see the need for an in-camera submission. But you may be
19 able to persuade me otherwise. I'm just not sure that I see it
20 on the issue of Mr. Podhaskie's representation of Mr. Guo.
Among other things, I would imagine that even if Mr. Guo
believed reasonably that he had an attorney-client relationship
with him, those communications might be privileged.

21 But, Mr. Wolman, returning to you, it is my concern
22 that by hitting the issue of attorney-client privilege so hard,
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1 you're trying to circumvent my decision on the Fifth Amendment
2 issue, which I'm sure you don't want to do.

3 So when we're talking about the attorney-client
4 privilege and its waiver, what specifically do you think you're
5 going to obtain?

6 For example, on the issue of mailings, is it your
7 contemplation that you'll be asking Mr. Guo to produce every
8 attorney-client communication that was received by mail?

9 MR. WOLMAN: Potentially, your Honor. And may I also
10 state that, while I'm not trying right now to undo your Honor's
11 Fifth Amendment ruling, it can't be used both as a shield and a
12 sword. When one invokes a privilege, this often is an adverse
13 inference. So here, if he is able to successfully invoke the
14 Fifth Amendment and shield even establishing the
15 attorney-client relationship, then there should be an adverse
16 inference that there is no attorney-client relationship or that
17 there has been a waiver. He can't have it both ways. He
18 cannot use it in both aspects.

19 THE COURT: Mr. Wolman, you're not listening to me, so
20 I'll try to be more clear.

21 As I thought I was making clear in my communications
22 with Mr. Gavenman, whatever concerns I have that led me to
23 agree with Mr. Guo regarding his Fifth Amendment assertions are
24 not necessarily things that are resonating with me in the
25 attorney-client privilege analysis, and that is why you just

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1 heard me say to him that I was disinclined to allow him to
2 substantiate the attorney-client privilege through an ex parte
3 submission or something that would be bound up in the Fifth
4 Amendment.

5 What I'm saying is, when you're talking about the
6 waiver of the attorney-client privilege, I'm not sure
7 specifically -- or the failure to establish an attorney-client
8 privilege, I'm not sure specifically what you think you're
9 getting out of that. So that is why I'm asking about the
10 question of the mail.

11 If what you're saying is you believe that the
12 transmission of mail and the possibility of periodic review of
13 the mail by the Golden Spring entity or any third party amounts
14 to a waiver of those privileged communications, then perhaps
15 you would be able to request whatever legal communications
16 Mr. Guo received by mail at Golden Spring that were opened up.
17 According to Mr. Gavenman, at least from his perspective, that
18 amounts to none.

19 But other than the mail issue and the possibility of
20 this single communication or communications with Mr. Podhaskie
21 regarding the Nevada litigation, I'm not sure what else, what
22 are the other subject matters that you believe you get to
23 inquire into because of deficiencies in establishing or the
24 fact of the waiver of the attorney-client privilege?

25 MR. WOLMAN: Thank you, your Honor.

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1 First, I would suggest that the information already
2 has been requested. I do not need to make a new request. To
3 the extent it has already been withheld, you know, that is the
4 issue at hand.

5 With respect to written documents, our written
6 requests were as broad as the court permitted and, you know, as
7 your Honor knows, we had to narrow them a few times.

8 We did ask for information. The parties agreed that
9 it would not be required to include attorney-client privileged
10 responses. But now we're finding out, at the deposition, that
11 these are not necessarily privileged or that the privilege has
12 been waived.

13 Perhaps Mr. Gavenman does not communicate by mail. We
14 know that he, Mr. Guo, testifies that he has no e-mail. So
15 even billing records, your Honor, does Mr. Gavenman never bill
16 anybody is a question here. Does it never go to the client?
17 He's got a duty of communication that I'm sure he is abiding,
18 and that typically includes writing.

19 Then there is the Nevada law firm that we're talking
20 about that prosecuted Mr. Cheng. We don't know that they never
21 communicated by mail, if all those communications go into
22 Golden Spring, and we have also submitted information that
23 shows that serial litigation to silence his enemies is part of
24 a pattern and practice of Mr. Guo, and we've inquired as to
25 that and those documents should be producible.

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1 The question we have then, and presumably this mail
2 has been withheld, to the extent that there is tactic of doing
3 so, that tends to show the necessary ill will in order to
4 establish a claim for punitive damages, which is in this case.
5 So that he has a pattern and practice, not just of doing it
6 against Mr. Cheng, but this is what he does to everybody who he
7 claims to be his enemies. And filing multiple suits on the
8 same day, those communications would tend to be admissible in
9 this case.

10 So there is that aspect.

11 THE COURT: Sir, excuse me. Sir, thank you for not
12 cutting me off.

13 If we could just go back to the issue you were just
14 saying about the communications regarding the pattern and
15 practice that you have alleged by Mr. Guo issues serial filing
16 in order to silence his enemies.

17 Let's imagine he had a conversation with attorneys,
18 and as a consequence of those conversations, he filed multiple
19 lawsuits in a day, as he did. Is it your suggestion that those
20 communications are subject to disclosure because no privilege
21 attached because Mr. Guo has not demonstrated that a privilege
22 attached or because any privilege that attached has been
23 waived?

24 MR. WOLMAN: If there are oral communications
25 potentially in the presence of a third party, they would not

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1 have attached. If we are talking about written communications
2 from his counsel all over the country who probably, at least
3 one of them is going to be mailing him, then we're talking
4 about a waiver issue.

5 THE COURT: I see. Based on the deposition testimony
6 that you took, what did you understand to be Mr. Guo's
7 communications with counsel antecedent to the filing of those
8 lawsuits?

9 MR. WOLMAN: Well, the problem is, your Honor, that
10 Mr. Gavenman repeatedly responded to my questions with an
11 admonition to his client not to disclose any attorney-client
12 information.

13 THE COURT: Of course, and I would have done the same.

14 But did he, at least, did Mr. Guo recall speaking with
15 counsel preliminary to these filings?

16 MR. WOLMAN: It is unclear, your Honor, because
17 Mr. Guo couldn't remember any attorney's name, except for
18 Daniel Podhaskie.

19 THE COURT: I see. OK.

20 You were about to say something else?

21 MR. WOLMAN: He didn't even know Mr. Gavenman's name
22 properly.

23 THE COURT: OK. All right. Sir, you were going to
24 say something else before I asked my followup question.

25 MR. WOLMAN: As I was saying, the invocation of

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1 privilege was not limited merely or at least the admonition of
2 not disclosing anything, any privilege, coaching his client not
3 to say things, was not limited merely to communications with
4 Mr. Podhaskie.

5 We cited in our letter last night the multiple
6 instances -- and I tried each time to only give one citation
7 per question at issue -- so that appears, every single citation
8 that I referenced in the letter last night is to a specific
9 question. It is that many questions where the admonition of
10 privilege was given.

11 THE COURT: One moment, please, sir.

12 Mr. Gavenman, looking at the first of these cites,
13 which is page 13, line 9 of the transcript in this case, I
14 could understand your argument that your client was protected
15 by the Fifth Amendment from disclosing whether he was being
16 prosecuted by any crime. But I don't know that -- I'm not sure
17 I could understand how he could decline to answer on the
18 grounds of attorney-client privilege. If, for example, his
19 attorney had advised him of the fact of investigational
20 prosecution, I'm not sure that that information is subject to
21 the attorney-client privilege.

22 But let me hear from you on that, please.

23 MR. GAVENMAN: Yes, your Honor.

24 It is my understanding -- and I certainly want to be
25 careful not to reveal anything -- it is my understanding that

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1 the discussions that were being had in the criminal context
2 were -- it was not necessarily direct communication from
3 whichever authority who was doing the discussing about the
4 exact contours of what was being investigated. Some of the
5 discussion then led to attorney work product and thoughts, and
6 then was communicated back as to exactly what is going on here,
7 what is being investigated and what is happening.

8 So as your Honor knows, there were some things that
9 were sent out and have been required interpretation by an
10 attorney to, you know, inform what may or may not be happening
11 in the investigations, which is why I think there is a
12 privilege that Mr. Guo could not testify to. The only real
13 understanding he has about what is going on is through this
14 filter of an attorney interpreting and then communicating to
15 him what his thoughts and his legal handiwork from the legal
16 acumen about where these things may or may not be going.

17 THE COURT: All right. One moment, please.

18 (Pause)

19 Thank you.

20 Mr. Gavenman, it would seem to me that I see the
21 invocations -- let me say that differently. I see the
22 instructions that you're giving him, and in some cases, I see
23 what you're saying is there are questions that might call for a
24 yes-or-no answer.

25 I'm just looking, for example, at the top of page 25,

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1 when he was simply asked whether he signed something in the
2 presence of Mr. Podhaskie, you cautioned him to not reveal any
3 attorney-client communications in the answer, which I suppose
4 is your right. But it seemed to me that that was a yes-no,
5 answer. That could be done without revealing attorney-client
6 communications.

7 So in some of the instances in which you are
8 instructing your client, I think it is -- well, I don't know
9 that it is inappropriate to do so. But some of these just,
10 again, seem to call for non-privileged information. Perhaps
11 you're just being extra careful with your client.

12 But there remains the issue of whether or not an
13 attorney-client privilege has been established or whether
14 Mr. Guo had a reasonable belief that he had an attorney-client
15 relationship. So if you would like to speak to that in writing
16 rather than on the fly today, that is fine. I'll let you do
17 that.

18 Is that what you wish to do so, sir?

19 MR. GAVENMAN: Yes, your Honor. Thank you.

20 THE COURT: OK. May I imagine that I'll receive
21 something at the end of next week?

22 MR. GAVENMAN: Absolutely. Absolutely.

23 THE COURT: OK. Thank you.

24 MR. GAVENMAN: OK.

25 THE COURT: OK. Mr. Wolman, if I put to the side the

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1 attorney-client privilege topic, because I don't feel that
2 I can speak authoritatively to it in the absence of the
3 information that I do not have. I think where we are now is
4 that your client is seeking third-party discovery and your
5 client is seeking the possibility of impleading. But that is
6 where I was turning my intentions next.

7 But are there other issues that you believe I should
8 be addressing first?

9 MR. WOLMAN: No, your Honor.

10 Certainly there would be consequences to the Fifth
11 Amendment invocations in terms of inferences, or if your Honor
12 allowed attorney-client privilege to certain aspects that may
13 need to be discussed, you know, either now or down the road.

14 THE COURT: Well --

15 MR. WOLMAN: But --

16 THE COURT: -- no. If I find that he can invoke the
17 Fifth, it is a general consequence of such an invocation in a
18 civil case that there are adverse inferences that can be drawn.
19 I'm not sure that today you and I need to identify what all of
20 those adverse inferences are. But I do agree that that tends
21 to happen when one invokes in a civil case, that adverse
22 inferences can be drawn.

23 I'm not sure we should be -- I guess I would like to
24 understand your belief about adverse inferences being drawn
25 from the invocation of the attorney-client privilege. Perhaps

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1 it is what we were talking about earlier, that if the
2 invocation is somehow itself bound up in the Fifth Amendment
3 invocation, that there would be an adverse inference.

4 But otherwise, are you, apart from that, suggesting
5 that an invocation of the attorney-client privilege results in
6 an adverse inference?

7 MR. WOLMAN: I mean, I would suggest that it goes --
8 we would need to address any individual issue versus whether or
9 not it is just, you know, simply forcing us to explore in
10 another direction. Because as your Honor indicated, we are
11 looking to now have to take third-party discovery, and
12 certainly the scheduling order and the processing of the case
13 indicates that there is a certain order.

14 Your Honor's order has a formal standing order or
15 formal format of a scheduling order has where you have to first
16 do written discovery to a party, then you do their depositions,
17 and only then can third-party discovery take place. Certainly
18 here, we would not even have anticipated the need for
19 third-party discovery until, you know, we learned at the
20 deposition the full extent to which Golden Spring may be an
21 alter ego or may be involved in conspiracy liability or maybe
22 have vicarious liability or may have even direct liability to
23 our client, such that -- arising from the same transactions to
24 this suit, giving rise to it.

25 So we do need to explore their role. And I don't know

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1 if they are claiming any Fifth Amendment privilege, but
2 certainly we should be permitted to take discovery from them
3 and potentially related entities to fully establish their
4 involvement in Mr. Guo's litigation against our client and
5 potentially tied to his patent practice of using litigation as
6 a weapon against third parties.

7 THE COURT: And yet I believe your adversaries are
8 telling me that you knew, as of the payment of the judgment in
9 the Nevada case, that Golden Spring was involved because it is
10 Golden Spring who wrote the check.

11 First of all, is that true?

12 Is it Golden Spring who, on his account, the check was
13 drawn?

14 MR. WOLMAN: It was a wire transfer, I believe, from
15 Golden Spring. But as we indicated --

16 THE COURT: Yes.

17 MR. WOLMAN: -- the mere payment there doesn't
18 necessarily mean that they were the ones paying it, as opposed
19 to merely providing some kind of assistance or even a bridge
20 loan of the funds, as opposed to being the ones behind the
21 litigation, paying for everything. Those are two different
22 things.

23 THE COURT: Thank you. I can appreciate that.

24 Mr. Gavenman, let me hear from you on the point of
25 third-party discovery. I've already raised your issue about

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1 them knowing or not knowing about the involvement of Golden
2 Spring, and Mr. Wolman has just told me why he could not have
3 known and could not have been expected to know the degree of
4 interrelationship until the deposition of Mr. Guo.

5 MR. GAVENMAN: Your Honor, first and foremost, I think
6 it is important to recall that discovery is not a free fishing
7 expedition to explore other claims you may want to make. It is
8 only to make proportionate requests relevant to the claims you
9 already have.

10 It is clear Mr. Wolman is suggesting he now wants to
11 go and find a new claim and go find evidence of this new claim.
12 It is not the case that we have here. And the discovery,
13 cracking open other outside entities and engaging in, you know,
14 third-party discovery for months, he has talked about 70 days
15 and forensic experts and the cell providers. There was no
16 limited request here. This was cracking open everything and
17 engaging in third-party discovery unlimited for quite a while.
18 And there just simply is no need.

19 It's been known to him that there was four actions
20 filed on the same day. That is not surprising. It is known to
21 him that they paid certain expenses. I mean, it's just --

22 THE COURT: No, Mr. Gavenman. Stop right there,
23 please.

24 MR. GAVENMAN: Sure.

25 THE COURT: According to Mr. Wolman, it wasn't known

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1 to him. It wasn't known until the deposition that Mr. Guo's
2 every expense was being paid for by Golden Spring. I won't
3 recount the litany of things that he said was paid by Golden
4 Spring.

5 So what he is saying is, it is one thing to see a
6 check with some other entity's name on it and think, oh,
7 perhaps there is a relationship or perhaps this entity is just
8 being used for one reason or another. But what he is saying
9 is, when he actually wanted to get into the question of
10 Mr. Guo's assets, he found at the deposition that, to the
11 extent that Mr. Guo was answering these questions and he wasn't
12 always, he was suggesting that everything was being paid for by
13 Golden Spring. That is, to put it nicely, a very unusual
14 relationship. And what he is saying is, if he is trying to
15 ascertain Mr. Guo's assets and Mr. Guo keeps saying, Everything
16 I have comes from Golden Spring, he should be entitled to take
17 discovery of the Golden Spring entity. This isn't as much of a
18 fishing expedition as you think it is.

19 So tell me why he can't do it.

20 MR. GAVENMAN: He did receive three separate wires
21 from Golden Spring, each time from Golden Spring, for large
22 amounts of money. I do think it is a fishing expedition. The
23 fact that Golden Spring paid for certain expenses, that doesn't
24 mean there is an anti-SLAPP -- I'm sorry, there is an action,
25 Count One is brought on anti-SLAPP grounds.

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1 It is clear that Mr. Guo brought that case. He was
2 the plaintiff. So they are saying he lost one and is now
3 entitled to certain recovery, but Golden Spring doesn't get
4 involved there. So for the prosecution of Count Two, there
5 just is no reason why the third-party discovery would go to
6 Mr. Guo's motivation, which really isn't even an element
7 either. This is -- you know, they know certain pieces, but
8 there is no need to know those pieces or anything more. This
9 is solely about what Mr. Guo was doing and thinking.

10 The only counts there are in this case, and going up
11 and opening up bank accounts, to the extent this is about his
12 assets, that is where I offered Mr. Wolman, before he made his
13 motion to discuss an adverse inference. I think there
14 certainly is a right to an adverse inference about his assets.
15 And I said in my e-mail to him that we should talk about it.
16 You can get, without having to go through this large discovery
17 exercise of months and months of time, I'm willing to talk
18 about this adverse inference. I think you're entitled to one.
19 Let's discuss.

20 Instead, he filed this motion 30 minutes later and
21 never once picked up the phone and decided to talk to me about
22 this issue, you know, which really shows the pattern that we've
23 been trying to show the court over and over again. This isn't
24 about the needs of this case. It is about either harassing
25 Mr. Guo or opening this up for other people who may want to see

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1 this information.

2 If it is just about assets, we're happy to talk about
3 the adverse inference. Certainly, we pointed out the Nevada
4 statute to show that is not really until the second phase of
5 this action. They can't even introduce this evidence about the
6 assets until after liability has been established.

7 So I don't think there is any need to going cracking
8 open third parties when the adverse inference will do.

9 THE COURT: But what does this adverse inference look
10 like?

11 It is an adverse inference Mr. Guo has substantial
12 assets, but they are all shielded by being put in the name of
13 Golden Spring. I mean, what is the adverse inference? Because
14 he is trying to figure out Mr. Guo's assets, and according to
15 him, he is being stymied because whenever he has asked about
16 it, Mr. Guo has said either that Golden Spring owns everything
17 and controls everything and provides him everything or that --
18 and further, that he can't speak anymore about it without
19 implicating his Fifth Amendment right against self-
20 incrimination.

21 So how is the adverse inference going to help the
22 plaintiff in this case?

23 MR. GAVENMAN: So, your Honor, the only reason his
24 assets are at issue is for the punitive damages question. They
25 are not just -- the discovery requests and his interest in

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1 these things had to be tethered to something, some element he
2 needs to prove, something he has to show, some relevant piece
3 to this litigation. And the only reason his assets are
4 relevant is for this punitive damages question about what is
5 Mr. Guo's net worth.

6 So I think the adverse inference -- and we can discuss
7 it as it goes along, I'm not sure that discussing it, you know,
8 now is perhaps other issues will come up. I'm sorry. I'm
9 trying to say other issues may come up. We can discuss the
10 contours of it. I think, as we sit here today, that is the
11 only way it is relevant. And the adverse inference would look
12 something like, you know, he has lack of assets, that is the
13 inference that can be drawn, or he is a billionaire.

14 We can discuss exactly what the contours of that might
15 look like and how far it needs to go. But that's the only
16 question that is relevant here, this issue of punitive damages
17 and what his assets are for that question.

18 THE COURT: Yes. Just so that I'm clear, sir, I mean,
19 the reason we're having this conversation at this moment is
20 that Mr. Wolman believes that discovery is necessary. And so
21 I was a little bit concerned when you said you weren't sure
22 precisely what the adverse inference, what form it would take,
23 and that more things may have to happen or that there might be
24 other developments.

25 Because I think what you're trying to say is that the

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1 adverse inference obviates the need for any third-party
2 discovery, and I'm just trying to drill down as to why.

3 MR. GAVENMAN: I certainly do think that, and I was
4 only trying to allow for the possibility that if there is other
5 issues that come up and need an adverse inference, they can be
6 discussed. I surely don't see them as we sit here today.

7 This is a very limited case, right. There is not that
8 much -- there is not many legal questions, not many factual
9 questions. It is a Very limited case. Not much by way of
10 damages. It is really this fairly narrow issue about what
11 Mr. Guo's motivations -- I'm sorry -- whether or not he acted
12 with mail suppression or fraud is sufficient to show that he
13 needs to be assessed punitive damages. And then it moves to,
14 perhaps, this other phase about what those punitive damages
15 should be. Then we get to the question of assets.

16 So I think the only way any of this third-party
17 discovery that Mr. Wolman has discussed becomes relevant is to
18 that single question, and that single question can be resolved
19 cheaply and easily and convenient and savings of all by giving
20 the adverse inference about what the assets are, Mr. Guo's
21 assets.

22 THE COURT: Mr. Gavenman, you heard Mr. Wolman and
23 I speak earlier about adverse inferences implicated by your
24 client's invocation of his Fifth Amendment privilege against
25 self-incrimination.

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1 Do you agree that invocation of the Fifth would, in
2 fact, implicate an adverse inference?

3 MR. GAVENMAN: I do, your Honor. That is why I
4 approached Mr. Wolman about it. I think that is correct.

5 THE COURT: OK. But isn't that adverse inference
6 regarding the propriety of punitive damages rather than their
7 amount?

8 MR. GAVENMAN: No. I certainly don't think so, your
9 Honor. I think it is only to the question of what his assets
10 are. I don't think there was ever invoked in a way that
11 suggests he acted with malice. I don't think that is
12 impression of fraud. I don't think there is any question about
13 that he deflected on the Fifth Amendment.

14 Your Honor, he discussed and, frankly, tried to
15 discuss even more. Mr. Wolman kept putting him off. Why he
16 brought the case, what he was doing, the contours of it, why
17 was it only \$15,000 in damages, why Mr. Cheng had said what he
18 said and why Mr. Guo filed the case. I think his motivations
19 out there on the record. He said Mr. Wolman was interested in
20 hearing about them. You saw that the transcript was very
21 infrequently. I don't think there is any adverse inference
22 that he acted in the way that would be the predicates for
23 punitive damages. It is solely to the question there was only
24 really wrapped up in what his relationship was with Golden
25 Spring and how those the assets and who, maybe who, that is the

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portion that was invoked upon and really only goes to the assets question for the amount of punitive damages.

THE COURT: OK. I appreciate your articulation of your position.

Mr. Wolman, are you seeking discovery or are you seeking impleading of the Golden Spring entity? And if the latter, we are now many, many months past the case management plan's deadline for the addition of new parties.

If all you care about is discovery, I'll focus my attention on that. If you are thinking about impleading, I want to understand that as well.

MR. WOLMAN: Thank you, your Honor.

First, I want to address a couple things. \$15,000 was a jurisdictional minimum that was pleaded. Just like someone would plead \$75,000 in federal court. It doesn't mean that they are capping their damages there.

There is another pleading he asked for at least 50,000 for another aspect of Nevada procedure, and I only would suggest that I stop Mr. Guo during deposition, and your Honor can see where Mr. Guo was filibustering rather than being evasive on his answers.

But in terms of your Honor's question, there is discovery to be had. It is not merely as to the amount of Mr. Guo's assets. You know, if the defendant wants to stipulate that he is a billionaire or he has got 15 billion or

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1 17 billion. I think there was some article I have seen as to
2 Mr. Guo's worth. We can discuss that.

3 But it also goes to, as he said, his motivation. So
4 where Golden Spring is so heavily involved in the day-to-day
5 life of Mr. Guo as to even providing his groceries, they would
6 likely have been -- or conversations had with these people and
7 mail, etc. -- there are elements here in terms of getting to
8 punitive damages, that if Mr. Guo would have acted with malice
9 and without probable cause, they would tend to have information
10 on that. They would know that he would have potentially acted
11 in an oppressive manner.

12 These are elements that would need to be established,
13 and this is something that Mr. Gavenman even had brought up in
14 opposition to an early summary judgment process. So these are
15 elements that need to be explored on a direct discovery as to
16 Mr. Guo's liability.

17 Now, as to joining them and impleading them as a
18 third -- as another defendant, yes, we would be looking at
19 that. The Rule 15 would generally allow amendment should be
20 freely given.

21 THE COURT: Yes. But, of course --

22 Sir, stop.

23 Of course Rule 15 bends to Rule 16, where there is a
24 deadline set forth in a court order. You would have to be
25 showing the Rule 16 standard, which is as to good cause.

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1 MR. WOLMAN: Right. There certainly is good cause
2 here, where the information was not disclosed and we could not
3 be reasonably expected to have understood that information.

4 Even certainly now, as we're learning, the questions
5 become and the invocation of the Fifth Amendment, there is a
6 question, if we were to try to implead them, are they an alter
7 ego? Is this vicarious liability? Is this conspiracy
8 liability? Or is there a direct claim that my client would
9 have, such as for unfairness deceptive trade practices?

10 This seems to be that this may be part of a business
11 plan and that he was targeted. One would look to taking down
12 enemies in terms of the FTC v. Juravin case down in Florida,
13 as being used where litigation is being used as an unfair trade
14 practice.

15 So while it would be for both purposes, discovery,
16 certainly to the extent that we learn information. We would
17 like to then potentially implead Golden Spring because they
18 should be held liable, to the extent that they are behind the
19 abusive litigation brought by Mr. Guo.

20 THE COURT: One moment, please.

21 (Pause)

22 Thank you. Mr. Gavenman, do you want to be heard?

23 MR. GAVENMAN: Sure, your Honor.

24 I think, once again, we have heard and reiterating
25 some points here, there is no claim now against Golden Spring.

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1 To the extent he says he wants to take discovery to find out
2 what claims he may have is just not appropriate discovery. I
3 also don't think impleading is appropriate procedural tool, as
4 the case is postured for the plaintiff to go bring in a third
5 defendant on impleading grounds. I just don't think that is
6 proper procedure.

7 But all this to say, there really is no reason
8 whatsoever to have to go to the motivations elsewhere besides
9 Mr. Guo. He is the only defendant in this case. He is the one
10 that brought the action. He testified at length, like he
11 brought the action. There were questions about whether or not
12 he had discussions with some people at Golden Spring, the CEO,
13 number of other people. Mr. Guo said he had not. He had not
14 had discussions about this. The only person he said he ever
15 discussed it with is one time with Mr. Podhaskie, and he didn't
16 even recall the contours of that conversation.

17 I think there is a record in the deposition that
18 Golden Spring is not actively involved and is not driving his
19 motivations in any way. He has his reasons for bringing the
20 case, and those were fully explained. I think this case is
21 ready for trial on those grounds. We can go and have all the
22 legal and factual discussions we need to have with what we have
23 and cracking this open. The third-party discovery is going to
24 be extremely expensive, disproportionate to the needs of the
25 case and really is just not the case that is in front of the

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1 court now and shouldn't be the basis for discovery.

2 THE COURT: OK. Mr. Wolman, I'm going to ask you to
3 obtain a copy of the transcript of this conference today, and
4 if you order it, sir, I'll receive it automatically. And you
5 can order it with whatever speed you think is appropriate.

6 I'm going to think about the issues, at least at this
7 stage. The appropriateness of third-party discovery and to the
8 Golden Spring entity, and I'll give you a decision as promptly
9 as I can.

10 I do also want to think about the attorney-client
11 privilege issues that have been raised today, and I'll be
12 waiting for Mr. Gavenman's letter to be received one week from
13 tomorrow.

14 Mr. Wolman, that, to me, are the issues that I wanted
15 to address in today's proceeding. But is there anything that
16 you believe I should also address before we end this
17 conference?

18 MR. WOLMAN: To the extent your Honor is considering
19 Mr. Guo's testimony, it needs to be considered as to whether or
20 not he is credible, and I think that needs to be considered as
21 well. And merely taking Mr. Guo's word for it, when he has
22 clearly had his bills paid by Golden Spring, they should know
23 what is going on. It is inconceivable that they don't.

24 So if they have information on every element of his
25 life and he doesn't know who was involved, he says he was

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1 involved with Golden Spring until prompted, apparently not
2 even -- you know, I've looked at other stuff. I think his son
3 is on the board. But if he's not able to say that he can
4 discuss -- he discussed this with anybody, not even his own
5 son, that screams credibility.

6 I think that the discovery here would be warranted,
7 but I don't see any other issues other than what is discussed
8 here or in terms of this general scheduling that was raised in
9 the parties' joint submission last week.

10 THE COURT: OK. Thank you.

11 Sir, I'm neither agreeing or disagreeing with the idea
12 that I should be considering Mr. Guo's credibility, but I do
13 appreciate that that is your view.

14 Mr. Gavenman, are there other issues we should be
15 discussing today?

16 MR. GAVENMAN: No, your Honor, except obviously we
17 strenuously disagree that his credibility was in any way
18 strained or called into question by the deposition testimony.
19 There was 60 different litigations and no cause to talk to them
20 about this particular one.

21 I did want to point out one other thing, because it
22 also was going to his alleged credibility, which is this
23 request 83 issue, where they said he had been dishonest,
24 documents showed he was dishonest. We showed that was not part
25 of the request. I did want to point your Honor to ECF 40,

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1 where Mr. Wolman actually requested 83 was limited in scope
2 from the form it had at that time to documents where he
3 admitted to being dishonest.

4 So Mr. Wolman misrepresented the scope of that
5 request, even in suggesting that Mr. Guo had not produced
6 proper documents and had been dishonest in that answer.

7 That is all, your Honor.

8 THE COURT: OK. All right. Well, I thank you both
9 for being so prepared today, and you'll hear from me as
10 appropriate when I receive the transcript and when I have
11 received the letter from Mr. Gavenman.

12 Thank you very much. And continue safety and good
13 health to you, your families, and your clients.

14 We are adjourned.

15 MR. GAVENMAN: Thank you, your Honor.

16 MR. WOLMAN: Thank you, your Honor.

17 (Adjourned)

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